

INQUIRY CONCERNING A) Supreme Court
JUDGE, NO. 02-487) Case No. SC03-1171

The issue raised by the Respondent's Motion in Limine is whether under Florida Statute 90.953(2) if a party simply raises a "genuine issue" as to the authenticity of a document, the document cannot be admitted in evidence and the trier of fact never hears or decides the issue of authenticity.

As the Chairman noted at the April 15, 2005 hearing, this entire case is about the authenticity of the "Holder paper". If, after hearing all the evidence, the Hearing Panel decides that the authenticity of the document has not been proven by clear and convincing evidence, the charges should be dismissed. If the evidence establishes the authenticity of the document as the paper that Holder submitted to the Air War College, the Hearing Panel should recommend that he be disciplined.

The Respondent quotes §953.1 of Professor Erhardt's book on Florida Evidence (2004 Ed.) that "if there is a genuine question concerning the authenticity of a duplicate, the duplicate is not admissible under section 90.953(2). Respondent, however, fails to call to the Court's attention the last sentence of the paragraph from which they quote Erhardt that "the original must be offered unless an adequate excuse for its non-production is demonstrated under section 90.954." (Emphasis added).

Special Counsel has acknowledged that there is a genuine issue as to the authenticity of the Holder paper. That is what the case is about. The Respondent has repeatedly cited Special Counsel's response to Request for Admissions that the Commission

"has no witness who can testify based on personal knowledge that the [Holder Paper] is an authentic copy of the actual paper that Respondent submitted to the Air War College in January 1998."

(Respondent's Supplemental Memorandum, p. 6).

The Respondent, however, has repeatedly failed to quote the remainder of that admission

"that [the] circumstantial evidence will establish by clear and convincing evidence that Exhibit 'A' [the Holder paper] was not

fabricated, but is an authentic copy of the actual paper the Respondent submitted to the Air War College in January 1998."

{Response to Request for Admissions, ¶16, filed 10/22/03}.

The Respondent contends that according to Professor Erhardt "a genuine question of authenticity is raised when the opponent of admission denies the document's authenticity." (Supplemental Memorandum, p. 5). If this were literally true, many cases would be decided simply by one party denying the authenticity of key documents but, as stated by Erhardt and ignored by the Respondent, when the authenticity of a document is raised "the original must be offered unless an adequate excuse for its non-production is demonstrated under section 90.954."

Section 90.954 provides:

"The original of a writing, recording, or photograph is not required, except as provided in 90.953, and other evidence of its contents is admissible when:

- (1) all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith."

The Respondent has admitted that he discovered sometime in 2001 that the original of his graded paper, along with the faxed copy of the paper by Colonel Hoard,

was missing. The original, therefore, is lost and the Respondent has not contended that the Commission (its Special Counsel) lost or destroyed the documents in bad faith.

In ITT Real Estate Equities, Inc. v. Chandler Insurance Agency, Inc., 617 So.2d 750 (Fla. 4th DCA 1993), the court said that authentication may be proved by circumstantial evidence and quoted from McCormick, Evidence §222 at 44 (4th Ed. 1992) that "proof of any circumstances which will support a finding that the writing is genuine will suffice to authenticate the writing." 617 So.2d at 751. Special Counsel, both in the original Response to Motion in Limine Regarding the Best Evidence Rule and at the hearing on April 15, 2005, set forth a general description of the circumstantial evidence establishing the authenticity of the Holder paper.

In State v. Love, 691 So.2d 620 (Fla. 5th DCA 1997), the trial court in a pretrial order suppressed a letter purportedly written by the defendant containing incriminating admissions. The Court of Appeal, after considering the circumstantial evidence as to the authenticity of the letter, held that the trial court erred in concluding that the State had failed to establish a prima facie showing of authenticity. The simple denial by the defendant that he had not written the letter did not, as suggested by the Respondent, end the inquiry. The

District Court noted that "in order to set forth a prima facie case of authenticity, the proponent of the evidence can utilize both direct and circumstantial evidence." (691 So.2d 622). The Court then said that

"the state argues that the final decision regarding genuineness is within the province of the jury and that the trial court's responsibility must end with the determination whether the facts support a finding of authenticity. We agree."

691 So.2d 591-622.

The Respondent cites two cases in support of his position, Osswald v. Anderson, 49 Cal. App. 4th 812, 57 Cal. Rptr.2d 23 (Cal. App. 1996), and United States v. Haddock, 956 F.2d 1534 (10th Cir. 1992). In Osswald, a party offered a photocopy of a quitclaim deed, but presented no evidence of a search for the original deed either at the Recorder's Office or in the personal files of the parties who made the deed from themselves to themselves as trustees. In addition, a copy was not in the file of the attorney who prepared the deed and neither the attorney nor the party offering the deed could explain why it was not. Counsel did not know where he got the copy and did not produce it until a few days before trial. On these facts, the court

held that the proponent of the deed did not carry his burden of showing the authenticity of the copy of the deed. In Haddock, the defendant proffered photocopies of six bank documents supporting his defense. The trial judge did not admit them in evidence. The Circuit Court affirmed noting it was not an abuse of discretion to not admit them because, except for the defendant no one, including in some cases persons who allegedly typed the document and persons to whom the original allegedly was sent, was familiar with the contents of the photocopies. Witnesses testified that several of the documents bore markings, including statements that did not comport with similar documents prepared in the ordinary course of the business of the bank. In this case, the circumstantial evidence does establish a prima facie case for the authenticity of the Holder paper and under the Florida case of Love v. State, supra, the Hearing Panel should make the final determination as to whether the facts support a finding of authenticity.

Respectfully submitted,

INVESTIGATIVE PANEL OF THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

Thomas C. MacDonald, Jr.
Florida Bar No. 049318
1904 Holly Lane
Tampa, Florida 33629
(813) 254-9871
(813) 258-6265 (Facsimile)

General Counsel for the Florida
Judicial Qualifications Commission

- and -

BEDELL, DITTMAR, DeVAULT, PILLANS &
COXE

Professional Association

By

Charles P. Pillans, III
Florida Bar No. 0100066
101 East Adams Street
Jacksonville, Florida 32202
(904) 353-0211
(904) 353-9307 (Facsimile)

Special Counsel to the Florida
Judicial Qualifications Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to each of the following by United States mail this _____ day of May, 2005.

Honorable John P. Kuder
Circuit Judge
Judicial Building
190 Governmental Center
Pensacola, FL 32501

Chairman of the Hearing Panel

John R. Beranek, Esquire
Post Office Box 391
Tallahassee, FL 32302-0391

Counsel for the Hearing Panel

David B. Weinstein, Esquire
Bales Weinstein
Post Office Box 172179
Tampa, FL 33672-0179

Juan Morillo, Esquire
Steven T. Cottreau, Esquire
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

Attorneys for Circuit Judge Gregory P. Holder

Attorney